No. 84-679 (4)

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In the Supreme Court
OF THE
United States

October Term 1984

BATEMAN EICHLER, HILL RICHARDS, INCORPORATED
Petitioner,
vs.
CARL F. BERNER, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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The following opinion and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Order of District Court, filed April 18, 1983 ..... Pet. App. C-1

Opinion of Court of Appeals, filed April 13, 1984 ..... Pet. App. A-1

Order of Court of Appeals, filed July 26, 1984 ..... Pet. App. B-1

United States District Court
Northern District of California

Date	Proceedings
1982	
Dec. 10	Complaint filed; summons issued.
1983	
Jan. 19	Defendants Neadeau & T.O.N.M. Oil answer complaint.
Jan. 20	Stipulation that defendants Charles P. Lazzaro and Bateman Eichler, Hill Richards ("BEHR") have to and including 2-18-83 within which to respond to the complaint.
Feb. 18	Defendants' (Lazzaro and BEHR) notice of motion and motion to dismiss complaint or, in the alternative, for an order compelling plaintiffs to make a more definite statement; memorandum of points and authorities in support thereof filed.
Feb. 22	Notice: judge to conduct status conference and hearing on defendants' motion to dismiss on 3-25-83 at 11:00 a.m. Previous date of 3-18-83 vacated.
Mar. 11	Order that status conference and hearing set for 3-25-83 be continued to 4-15-83 at 11:00 a.m.
Apr. 8	Defendants (Lazzaro and BEHR) reply memorandum.
Apr. 15	Hearing on plaintiffs' filed motion to file amended complaint and defendants' motion for dismissal and for more definite statement. Motion taken under submission.
Apr. 18	Order that complaint be dismissed. Judgment entered for defendants, each party to bear own costs.
May 13	Notice of appeal by plaintiff. Fee paid. USCA *#83-1972.* Docket fee payment form mailed to USCA and counsel.

United States Court of Appeals for the Ninth Circuit

Date	Filings-Proceedings

1983

May 17 Docket number assigned.

June 3 Filed appellants' civil docketing statement.

July 5 Prebriefing conference order filed: On June 28, 1983 a prebriefing conference was held by telephone before conference attorney Norman P. Vance: (1) Appellants shall file a brief of not more than 30 pages on or before August 26, 1983. (2) Appellees Lazzaro and BEHR shall file a brief of not more than 30 pages on or before October 7, 1983. (3) Appellees Neadeau and T.O.N.M. shall file a brief of not more than 15 pages on or before October 28, 1983. (4) Appellants may file a reply brief of not more than 15 pages within 14 days of the service date of the appellees' brief. (5) If the parties meet this briefing schedule, the appeal should be calendared for argument in December, 1983.

Aug. 19 Filed appellants' motion for an extension of time to file opening brief.

Aug. 24 Filed order (Boochever): Appellants' motion for an extension of time to Sept. 23, 1983 in which to file their opening brief is denied. The opening brief shall be filed no later than Sept. 9, 1983. The briefing schedule is revised as follows: Lazzaro and BEHR shall file their brief on or before Oct. 21, 1983; Neadeau and T.O.M.N. shall file a brief on or before Nov. 10, 1983. In all other respects the conference attorney's order of July 5, 1983 is unchanged. No further requests for extension of time will be granted absent a showing of extraordinary circumstances.

Sept. 12 Filed original and 15 amicus curiae briefs from SEC (17 pgs.).

Date	Filings-Proceedings

Sept. 13 Filed original & 15 appellants' opening briefs (25 pgs.) and 5 excerpts.

Oct. 25 Filed original & 15 appellees' (Lazzaro & BEHR) briefs (29 pgs).

Nov. 28 Filed original & 15 appellants' reply briefs (7 pgs.).

1984

Jan. 31 Filed motion of SEC for leave to participate in oral argument.

Feb. 6 Filed order: The motion of amicus curiae, SEC, to share the appellants' oral argument time is granted. Counsel for the parties are requested to be prepared to discuss the analogy of the in pari delicto defense in antitrust cases. *See, e.g.,* Thi-Hawaii v. First Commerce Financial Corporation,,627 F.2d 991 (9th Cir. 1980).

Feb. 15 Filed additional citation from appellees' attorney.

Feb. 15 Argued and submitted before: Anderson, Schroeder & Alarcon, CJJ.

April 13 Ordered opinion (Alarcon) filed and judgment filed and entered.

April 13 Filed opinion — reversed.

April 13 Filed and entered judgment.

April 30 Filed appellees' petition for rehearing & suggestion for hearing en banc (all judges).

May 4 Received letter from D. Kraus, counsel for appellant dated 5/1/84 re: clarification of the opinion.

July 23 Filed order (Anderson Schroeder & Alarcon, CJJ): The court's opinion in this matter is amended as follows: A new footnote #1 has been added (see

Date Filings-Proceedings

case file). By adding this new footnote, the numbering sequence of the footnotes is changed, i.e., the old footnote #1 becomes footnote #2, etc.

July 26 Filed order (Anderson Schroeder & Alarcon, CJJ): The opinion decided April 13, 1984, has been amended as follows: (see case file). The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Aug. 3 Mandate issued.

Aug. 3 Filed appellants' notice of change of address.

Nov. 5 Received Supreme Court notice of the filing of certiorari on 10-24-84, SC# 84-679.

1985

Jan. 11 Filed order from Supreme Court granting certiorari.

Jan. 11 Case reopened.

COMPLAINT

IN THE
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA.

CARL F. BERNER, CHARLES BRUNER, DENNIS T. DEMETRE, LAWRENCE EPSTEIN, BARRY S. GLASS, HERBERT GREENBAUM, ROBERT M. JACOBS, ARNOLD R. KEILES, HARRY MITTLEMAN, and GARY L. NOBEL,
Plaintiffs,
vs.
CHARLES P. LAZZARO; BATEMAN EICHLER, HILL RICHARDS INCORPORATED; LESLIE L. NEADEAU; and T.O.N.M. OIL & GAS EXPLORATION CORPORATION;
Defendants.

NO. C 82 6716WWS

COMPLAINT FOR DAMAGES FOR VIOLATIONS OF SECURITIES LAWS; BREACH OF FIDUCIARY DUTY; FRAUD AND DECEIT; CALIF. CORP. CODE §§ 25400 AND 25500 ET SEQ. (Jury Trial Demanded)

Plaintiffs above-named, demanding a trial by jury, complain of the above-named defendants as follows:

I.

JURISDICTION AND VENUE

1. This action is brought under the Securities Act of 1933 (hereinafter called "Securities Act"), the Securities Exchange Act of 1934 (hereinafter called "Exchange Act"), California Civil Code Sections 1572 and 1710, and California Corporations Code Sections 25400 and 25500 *et seq.* Jurisdiction is conferred on this Court by Section 22 of the Securities Act (15 U.S.C. § 77v), Section 27 of the Exchange Act (15 U.S.C. § 78aa), and the pendent jurisdiction of this Court, in order to declare, and to recover damages resulting from, the violations by defendants, as hereinafter alleged, of Section 10[sic](a) of the Securities Act (15 U.S.C. § 77q), of Section 9(a) of the Exchange Act (15 U.S.C. § 78i), of Section 10(b) of the Exchange Act (15 U.S.C. § 78j(b)[)], of Section 15(c) of the Exchange Act (15 U.S.C. § 78o(c)), the rules and regulations issued by the Securities and Exchange Commission pursuant to said sections (particularly Securities and Exchange Commission Rule 10b-5 (17 C.F.R. 240.10b-5)), and the California Civil Code Sections enumerated above.

2. Substantial and significant acts of defendants in connection with the matters hereinafter alleged have occurred in this judicial district. Each of the defendants is found, transacts business or has committed one or more of the unlawful acts, as hereinafter alleged, within the Northern District of California.

3. Each of the defendants directly and indirectly made use of means or instrumentalities of transportation or communication in interstate commerce or of the United States mails in connection with each of the unlawful acts and practices hereinafter alleged.

II.

PARTIES

4. Plaintiff Carl F. Berner is a resident of the County of King, State of Washington. Plaintiffs Charles Bruner, Dennis T. Demetre, Lawrence Epstein, Arnold R. Keiles and Harry Mittelman are residents of the County of Santa Clara, State of California. Plaintiffs Barry S. Glass and Herbert Greenbaum are residents of the City of Baltimore, State of Maryland. Plaintiff Gary L. Nobel is a resident of the County of San Diego, State of California. Plaintiff Robert M. Jacobs is a resident of the County of Contra Costa, State of California.

5. Defendant Bateman Eichler, Hill Richards Incorporated (hereinafter called "Bateman Eichler") is a corporation organized under the laws of the State of Delaware. Bateman Eichler was and is engaged in the business of underwriting and selling securities and was and is transacting business throughout the State of California, including this judicial district. At all times material hereto, defendant Bateman Eichler was a "controlling person" of defendant Charles P. Lazzaro (hereinafter called "Lazzaro") as that term is used in Section 20(a) of the Exchange Act (15 U.S.C. § 78t[(a)]).

6. Defendant Lazzaro was and is a registered representative for the purchase and sale of securities on national securities exchanges and otherwise. On information and belief, he is a resident of the County of San Diego, State of California. At all times relevant hereto, defendant Lazzaro was acting within the course and scope of his authority and employment and was subject to and under the supervision of defendant Bateman Eichler.

7 Defendant T.O.N.M. Oil & Gas Exploration Corporation (hereinafter called "TONM") is a corporation organized under the laws of the State of New Mexico. On

information and belief, TONM issued common stock and approximately 14,400,800 shares were issued and outstanding as of March, 1981.

8. On information and belief, defendant Leslie L. Neadeau (hereinafter called "Neadeau") was and is a resident of the County of Sacramento, State of California. At all times material hereto, Leslie L. Neadeau was and is the president of defendant TONM and owned approximately 100,000 shares of the outstanding common stock of that company. At all times material hereto, TONM was and is engaged in the business of oil, gas and mineral exploration and development, and has its principal place of business in the City of Sacramento, State of California.

9. At all times material hereto, defendants Neadeau and TONM have directly and indirectly participated with, aided and abetted, and conspired with the other defendants in the illegal acts and transactions hereinafter alleged.

III.

FACTUAL ALLEGATIONS

10. In or about 1979, defendant TONM, and its subsidiary, International Gold and Diamond Exploration Corp., Inc., formerly known as the Surinam Gold and Minerals Co., Inc. (a Nevada corporation hereinafter called "IGDE"), entered into joint venture exploration and/or mining agreements with six non-affiliated Surinamese companies pursuant to three-year concession licenses granted to the Surinamese companies by the Minister of Development in Surinam. TONM and IGDE stock was subsequently exchanged with these Surinamese companies in exchange for fractional interests in these concessions. The Surinamese exploration licenses were granted for an initial term of 3 years and could be

extended for an additional 2 years. Also, the exploration licenses can be converted into development licenses, though there is no assurance that the government of Surinam will grant the conversion. All licenses involved rental payments to the Republic of Surinam, and profits made by the companies could be taxed.

11. Plaintiffs are informed and believe and thereon allege that Gold [sic] exploration has been conducted in Surinam (a country formerly known as Dutch Guiana located on the Northeast, Atlantic Coast of South America) for more than a hundred years. However, the highest gold production in Surinam in any one year was 1,209 kilograms in 1908, which figure has steadily declined since that time due to the exhaustion of well-known deposits and the relatively low value of gold against the high costs of exploration and production.

12. Plaintiffs are informed and believe and thereon allege that road access to the concessioned areas to be explored by TONM were limited and the areas were accessible primarily by motorized canoes and helicopter. Those areas were historically mined by Surinamese natives using primitive methods and some gold had been recovered from the area. However, no known ore body of an extent which could be commercialized was defined and, accordingly, TONM's program was an exploratory search for commercial bodies of ore and su sequent [sic] development of same if and when discovered.

13. For the fiscal years ending April 30, 1979-1981, TONM and its subsidiaries showed the following earnings and losses:

Year	Earnings (Losses)
1979	($119,445)
1980	($127,521)
1981	$ 18,481

Furthermore, for the nine months ending October 31, 1981, TONM and IGDE showed losses of $72,740.

14. Plaintiffs are informed and believe and thereon allege that, during the period from May 1, 1979 to June 30, 1981, TONM had approximately 8000 stockholders, and was traded over-the-counter through the National Association of Securities Dealers ("NASDAQ") system. During that period, TONM paid no dividends. Also, during that period, the high and low bid price for TONM stock was as follows:

Quarter/Year	High	Low
3rd/1979	.625	.170
4th/1979	3.250	1.050
1st/1980	6.000	1.150
2nd/1980	3.625	2.130
3rd/1980	5.030	2.750
4th/1980	7.125	3.875
1st/1981	5.010	1.150
2nd/1981	2.000	1.030

15. Commencing in or about November, 1979, defendant Lazzaro directly and indirectly advised plaintiffs to purchase, and plaintiffs did purchase through Lazzaro and other brokers, substantial amounts of TONM over-the-counter stock on the premise that Lazzaro was privy to certain information not otherwise available to the general public. The price of TONM stock when purchased by the plaintiffs herein varied from 1 1/16 to 5 1/4 /share.

16. At various times from November, 1979 through January, 1981, Lazzaro made the following representations, *inter alia*, to some or all of the plaintiffs herein concerning TONM stock, with the intent to induce all of

the plaintiffs herein to purchase substantial quantities of these stocks and to thereby manipulate the price thereon:

a. Vast amounts of gold had been discovered in Surinam, and TONM had options on thousands of acres in gold-producing regions of Surinam.

b. The find had been verified by geological reports and the find compared favorably to, if not better than, those in South Africa.

c. The presence of the find and the geological report(s) were not publically known, but would subsequently be announced.

d. The development of the Surinam gold fields would not require deep mining. Geologists in Surinam were finding gold nuggets in dry creek beds.

e. TONM was negotiating with the St. Joseph Mining & Mineral Company, and possibly other large companies, from as early as February, 1980, to engage in a joint venture to mine the gold in Surinam.

f. The St. Joseph Mining & Mineral Company was to invest two hundred million dollars to mine the gold in Surinam.

g. After that announcement, Lazzaro stated that TONM stock would go up 6-11 points. Thus, TONM stock, which was then selling from $1.50 to $3.00/share, would increase in value to $10 to $15/share within a short period of time, and that [sic] it might increase to $100/share by the end of 1980.

h. TONM shareholders would *automatically* receive 1 share of IGDE for every 5 shares of TONM stock without the payment of any additional monies.

i. Lazzaro and his relatives owned a large block of TONM stock, and neither Lazzaro nor any of his relatives were, at any time, selling their TONM stock.

17. Lazzaro represented that he knew personally the President and/or Vice-President of TONM and TONM was going to announce publicly by April, 1980, that St. Joseph's Mineral & Mining Company was entering into a joint venture with TONM.

18. In or about March, 1980, IGDE issued to stockholders of TONM rights to subscribe to shares of IGDE's common stock at $1.50/share at the rate of 1 right for each 5 shares of TONM common stock held of record. TONM shareholders never, at any time relevent hereto, received rights to subscribe for IGDE shares without payment therefor.

19. In or about April, 1980, certain plaintiffs contacted Leslie L. Neadeau, President of TONM, to attempt to verify Lazzaro's claims concerning the Surinam gold find and whether TONM was going to enter into a joint venture agreement with St. Joseph Mining & Mineral Company or with any other company for the exploration and mining of gold in Surinam. Mr. Neadeau would neither confirm nor deny those claims, stating that they were not public knowledge and that plaintiffs would have to wait for the publication of TONM's annual report. Mr. Neadeau was specifically advised that plaintiffs were dealing with Lazzaro, and Mr. Neadeau told the plaintiffs that he could say that Lazzaro was very trustworthy and a good man.

20. When no announcement of the joint venture was made in April, 1980, Lazzaro stated that the announcement was delayed because of, *inter alia*, certain Securities Exchange Commission filings required because of the

foreign investment, the death of a TONM executive's wife, and because of delays in coordinating the deal between several countries and companies. When the announcement of the joint venture still had not been released by September, 1980, Lazzaro stated the joint venture was still on and that it would be announced shortly. In October or November, 1980, Lazzaro represented that negotiations between TONM and St. Joseph's Mineral & Mining Company had broken down, but that they would resume, and that it was still his recommendation to buy more TONM stock. In January, 1981, TONM announced that the negotiations for a joint venture had terminated and that no new negotiations were contemplated.

21. When the IGDE stock was not issued to plaintiffs by May, 1980 as previously represented by Lazzaro, Lazzaro stated that the issuance of shares had been delayed by a Securities Exchange Commission filing requirement.

22. In or about the fourth quarter of 1980, the price of TONM stock had risen to $7.00/share and some or all of the plaintiffs informed Lazzaro that they wished to liquidate their TONM shares at that time. However, Lazzaro stated that he would let the plaintiffs know when to sell the TONM stock, and that they should not sell just because the stock had reached $7.00/share because it would go higher still.

23. On information and belief, at various times from November, 1979 through October, 1981, Lazzaro controlled over a million shares of TONM stock through stock purchased by himself and his clients. Lazzaro could thereby and did influence and manipulate the price of TONM stock through purchases and sales thereof, and through the dissemination of false information to plaintiffs and others. On information and belief, as a direct

result of Lazzaro's market manipulations and misrepresentations as aforesaid, he caused the price of TONM stock to rise to approximately $7.00/share by the fourth quarter of 1980.

24. By the end of 1980, the price of TONM stock had fallen to approximately $1.00 per share. Thereafter, some or all of the plaintiffs, in order to mitigate their damages, sold their TONM stock at prices substantially below the price at which they had purchased those securities.

25. By the second quarter of 1981, the price of TONM stock had fallen to less than a $1.00 a share.

26. On or about September 14, 1981, TONM announced that it was one of several entities named in an Order for Private Investigation by the Securities and Exchange Commission relating to companies with mining interests in Surinam. The Securities and Exchange Commission was and/or is investigating possible violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act in connection with trading in TONM's shares.

IV.

FIRST CLAIM
(15 U.S.C. § 78j)

27. Plaintiffs incorporate by reference paragraphs 1 through 26.

28. Through the use of means and instrumentalities of interstate commerce, the U.S. mails and facilities of national securities exchanges, defendants, and each of them, separately and in concert, directly and indirectly, aiding and abetting each other, in connection with the purchase and sale of TONM securities for plaintiffs,

knowingly: (a) used and employed manipulative, deceptive and fraudulent devices, schemes and artifices; (b) made untrue statements of material facts and failed to state material facts necessary to avoid the misleading effects of other statements that were made; and (c) engaged in acts, practices and a course of business and business conduct which operated as a fraud and deceit upon plaintiffs. As a result thereof, defendants, and each of them, violated Section 10(b) of the Exchange Act (15 U.S.C. § 78j); Rule 10b-5 of the Rules of the Securities and Exchange Commission (17 C.F.R. 240.10b-5) and other regulations issued by the Securities and Exchange Commission pursuant to Section 10(b).

29. At all times material hereto, defendants, in person and through their employees and agents, communicated to the plaintiffs some or all of the misrepresentations set out in paragraphs 15-22. Those representations were made to induce and communicate certain unlawful representations and schemes and business fraud on the plaintiffs.

30. The representations of the defendants were untrue and/or contained only half-truths, material omissions of fact and falsehoods.

31. The representations were made by the defendants with the intention that the plaintiffs would rely thereon.

32. The defendants knew that the representations as alleged hereinbefore were untrue and/or were made recklessly with wanton disregard for the truth.

33. Many facts which would be relevant to the determination of the true value of TONM stock were withheld from plaintiffs. Specifically, plaintiffs were not told, *inter alia*, that the TONM gold "find" was in the exploration stage, not the development stage; that there was no known body of ore as yet; that there had never been an

agreement reached between TONM and any major company for a joint venture in Surinam; that TONM shareholders would have to pay $1.50/share for IGDE stock; and that TONM lost money in 1980 and made only $18,000 in 1981. All of these facts, among others, were known to defendants and were withheld from plaintiffs.

34. Defendants failed to disclose pertinent facts for [sic] the purpose and intent to deceive plaintiffs and induce them to purchase TONM stock.

35. Defendants had a duty not to prefer or favor their interests over the interests of plaintiffs and were obligated to represent facts and make recommendations in accordance with plaintiffs' best interests for financial security.

36. Instead of protecting plaintiffs' interests, defendants proceeded to generate income to themselves, expenses to plaintiffs, and capital losses to plaintiffs.

37. Plaintiffs relied upon defendants' statements and inducements on the occasions they recommended transactions. These statements and inducements and omissions of facts necessary to make such statements not misleading were material and they resulted in losses to plaintiffs.

38. In buying and selling securities for plaintiffs' accounts, defendants violated and breached their duties and obligations to plaintiff in that:

a. They made numerous material misrepresentations and omissions as hereinbefore alleged.

b. They induced the purchase and sale of TONM securities without any basis or justification other than to profit themselves through the taking of commissions and secret profits.

39. At all times material hereto, Bateman Eichler was a controlling person of Lazzaro, and is therefore liable for

all losses resulting from the violation of federal securities laws herein alleged.

40. At all times material hereto, Neadeau and TONM aided and abetted and conspired in the violation of the federal securities laws herein alleged and are therefore liable for such violations.

41. As a result of defendants' conduct, as hereinabove alleged, in violation of Section 10(b) of the Securities Act, Rule 10b-5 of the Rules of the Securities and Exchange Commission and other regulations issued pursuant to said section and in breach of their fiduciary duties and obligations to plaintiffs, plaintiffs have been damaged in the following respects:

a. Plaintiffs purchased TONM stock at a price substantially higher than the prices at which they were able to sell these securities, thereby suffering capital losses.

b. Plaintiffs did not sell their TONM stock when it reached its highest value, when plaintiffs wanted to sell, thereby suffering lost profits.

c. Plaintiffs did not invest in other, less speculative ventures, thereby suffering lost profits.

Plaintiffs, therefore, have been damaged by defendants in the amount of at least $2,000,000, or such other amount as may be proved at trial.

WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

V.

SECOND CLAIM
(15 U.S.C. § 78o(c))

42. Plaintiffs hereby incorporate by reference paragraphs 1 through 41.

43. Through the use of means and instrumentalities of interstate commerce and the U.S. mails, defendants, and each of them, separately and in concert, directly and indirectly, aiding and abetting each other, induced and effected the purchase and sale of TONM securities for plaintiffs: (a) by means of manipulative, deceptive and fraudulent devices and contrivances; (b) by making untrue statements of material facts and by omitting to state material facts necessary to avoid the misleading effects of other statements that were made, with knowledge and reasonable grounds to believe that the statements and implications therefrom were untrue or misleading; and (c) by engaging in acts, practices and a course of business which operated as a fraud and deceit upon plaintiffs. As a result thereof, defendants, and each of them, have violated Section 15(c) of the Exchange Act (15 U.S.C. § 78o(c) [sic] and the rules and regulations issued by the Securities and Exchange Commission pursuant to said section.

44. As a result of defendants' conduct, as hereinabove alleged, in violation of Section 15(c) of the Exchange Act and the rules and regulations issued by the Securities and Exchange Commission pursuant to this section and in breach of their fiduciary duties and obligations to plaintiffs, plaintiffs have been damaged in each and every respect set forth in paragraph 41 of the First Claim of this Complaint.

WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

VI.

THIRD CLAIM
(15 U.S.C. § 78(i)(a))

45. Plaintiffs incorporate by reference paragraphs 1 through 41.

46. Through the use of means and instrumentalities of interstate commerce and the U.S. mails, defendants, and each of them, separately and in concert, directly and indirectly, aiding and abetting each other, induced and effected the purchase and sale of TONM securities for plaintiffs for the purpose of creating a false or misleading appearance of active trading in TONM securities to raise the value of these securities, and to induce the purchase and sale of these securities: (a) by means of manipulative, deceptive and fraudulent devices and contrivances; (b) by making untrue statements of material facts and by omitting to state material facts necessary to avoid the misleading effects of other statements that were made, with knowledge and reasonable grounds to believe that the statements and implications therefrom were untrue or misleading; and (c) by engaging in acts, practices and a course of business which operated as a fraud and deceit upon plaintiffs. As a result thereof, defendants, and each of them, have violated Section 9(a) of the Exchange Act (15 U.S.C. § 78(i)(a)) and the rules and regulations issued by the Securities and Exchange Commission pursuant to said section.

47. As a result of defendants' conduct, as hereinabove alleged, in violation of Section 9(a) of the Exchange Act and the rules and regulations issued by the Securities and Exchange Commission pursuant to said section and in breach of their fiduciary duties and obligations to plaintiffs, plaintiffs have been damaged in each and every

respect set forth in paragraph 41 of the First Claim of this Complaint.

WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

VII.

FOURTH CLAIM
(15 U.S.C. § 77q)

48. Plaintiffs incorporate by reference paragraphs 1 through 41.

49. Through the use of means and instrumentalities of interstate commerce and the U.S. mails, defendants, and each of them, separately and in concert, directly and indirectly, aiding and abetting each other, in offering and selling TONM securities to plaintiffs: (a) employed and used manipulative, deceptive and fraudulent devices, schemes and artifices; (b) made untrue statements of material facts and omitted to state material facts necessary to avoid the misleading effects of other statements that were made; and (c) engaged in acts, practices and a course of business and business conduct which operated as a fraud and deceit upon plaintiffs. As a result thereof, defendants, and each of them, have violated Section 17(a) of the Securities Act (15 U.S.C. § 77q [(a)]).

50. As a result of defendants' conduct, as hereinabove alleged, in violation of Section 17(a) of the Securities Act and in breach of their fiduciary duties and obligations to plaintiffs, plaintiffs have been damaged in each and every respect set forth in paragraph 41 of the First Claim of this Complaint.

WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

VIII.

FIFTH CLAIM
(Breach of Fiduciary Duty)

51. Plaintiffs incorporate by reference paragraphs 1 through 26, and this Court has pendent jurisdiction over this claim.

52. By reason of the matters alleged hereinabove, defendants Lazzaro and Bateman Eichler assumed the direction, control and management of plaintiffs' financial affairs and they acted in a fiduciary capacity towards plaintiffs and plaintiffs were thereby induced to and did place full trust and confidence in them. Throughout the period that defendants occupied such a position of trust and confidence, plaintiffs were entitled to the highest degree of loyalty from them and were entitled to their faithful services. In addition, they had a duty not to prefer or favor their interests over the interests of plaintiffs and they were obligated to exercise their direction, control and management of plaintiffs' financial affairs in accordance with the circumstances indicated by plaintiffs' expressed wishes and financial condition.

53. By their conduct as hereinabove alleged, defendants Bateman Eichler and Lazzaro violated their fiduciary duties and obligations to plaintiffs and as a result thereof plaintiffs have been damaged in each and every respect set forth in paragraph 41 of the First Claim of this Complaint.

WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

IX.

SIXTH CLAIM
(Fraud and Deceit)

54. Plaintiffs incorporate by reference paragraphs 1 through 26, and this Court has pendent jurisdiction over this claim.

55. Defendants, and each of them, separately and in concert, directly and indirectly, aiding and abetting each other, and acting in a fiduciary capacity in relation to plaintiffs: (a) suggested as fact that which was not true, never believing those suggestions to have been true; (b) asserted as fact that which was not true, never having reasonable ground for believing those assertions to be true; (c) suppressed facts although bound to disclose them and gave information of other facts which did mislead for want of communication of those facts; and (d) made promises without any intention of performing them.

56. Said representations, suggestions, promises, assertions and suppressions of facts were made as to material facts.

57. Defendants were under a duty to correctly state facts, assertions, promises and suggestions of fact and not to suppress other facts in the context of their dealings with plaintiffs.

58. Defendants made these assertions, promises, suggestions of fact and suppressions of fact intending to induce plaintiffs' reliance upon them. Plaintiffs, unaware of the falsity of the representations made, unaware that suggestions of fact were not true, unaware that assertions of fact were not true, unaware of facts suppressed and unaware that the promises made were made without intention to perform them did so rely on defendants' actions and were justified in doing so. As a result thereof

defendants have violated Sections 1572 and 1710 of the California Civil Code.

59. As a result of defendants' conduct, as hereinabove alleged, in violation of California Civil Code Sections 1572 and 1710 and in breach of their fiduciary duties and obligations to plaintiffs, plaintiffs have been damaged in each and every respect set forth in paragraph 41 of the First Claim of this Complaint.

60. In committing all of the foregoing acts of misconduct, defendants acted fraudulently, oppressively, maliciously and in flagrant, aggravated, wanton and reckless abuse of the confidence reposed in them by plaintiffs, and plaintiffs are therefore entitled to and demand damages for sake of example and by way of punishment of defendants in the amount of $5,000,000.

WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

X.

SEVENTH CLAIM
(Negligent Misrepresentation)

61. Plaintiffs incorporate by reference paragraphs 1 through 26, and 54 through 60, and this Court has pendent jurisdiction over this claim.

62. Defendants, and each of them, made these representations with no reasonable ground for believing them to be true in that, on information and belief, defendants did not have accurate information nor any information from inside sources or otherwise concerning, *inter alia,* the Surinam gold "find", the financial status of TONM, and the status of alleged negotiations between TONM and another mining company regarding a joint venture to

explore and/or develop the Surinam gold find, and defendants were aware that without such information they could not accurately make the representations alleged in paragraphs 15-22.

63. At the time of the making of these representations, and at all times thereafter, defendants concealed from plaintiffs their lack of information and their consequent inability to make the alleged representations accurately.

64. By their conduct as hereinabove alleged, defendants, and each of them, have breached their obligations to plaintiffs, and plaintiffs have been damaged in each and every respect set forth in paragraph 41 of the First Claim of this Complaint.

65. In committing all of the foregoing acts of misconduct, defendants acted fraudulently, oppressively, maliciously and in flagrant, aggravated, wanton and reckless abuse of the confidence reposed in them by plaintiffs, and plaintiffs are therefore entitled to and demand damages for sake of example and by way of punishment of defendants in the amount of $5,000,000.

XI.

EIGHTH CLAIM
(California Corporations Code)

66. Plaintiffs incorporate by reference paragraphs 1 through 26, and this Court has pendent jurisdiction over this claim.

67. Between November, 1979 and December, 1981 defendants caused to be offered and sold to plaintiffs and did offer and sell to plaintiffs the common stock of TONM, by means of written communication of the untrue statements of material fact and misleading omissions to

state material fact set forth in paragraphs 15-22, in violations of Sections 25400 and 25500 *et seq.* of the California Corporations Code.

68. Defendants knew, at the time the misrepresentations and omissions were made, that they were false and misleading. Defendants intended for plaintiffs to rely on the misrepresentations and omissions in the purchase of the TONM stock.

69. Plaintiffs believed these representations to be true, and in reliance thereon, purchased a substantial amount of TONM stock.

70. As a result of defendants' conduct, as hereinbefore alleged, in violation of Calif. Corp. Code §§ 25400 and 25500 *et seq.*, plaintiffs have been damaged in each and every respect set forth in paragraph 41 of the First Claim of this Complaint.

WHEREFORE, plaintiffs pray against defendants as follows:

1. For general damages in the amount of at least $2,000,000 or such other amount as may be proved at trial.

2. For exemplary damages in the amount of $5,000,000;

3. For costs of suit and attorneys' fees herein;

4. For such other and further relief as the Court deems just and proper.

Dated: December 10, 1982
San Francisco, California

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DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, plaintiffs hereby demand a trial by jury of all issues triable of right by a jury.

Dated: December 10, 1982
San Francisco, California

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